Supreme Court, U.S.
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No. 98-157

In the
Supreme Court of the United States
OCTOBER TERM, 1997

FRIEDERIKE MONIKA ADSANI,

Petitioner,

vs.

PETER MILLER; PMA LITERARY AND FILM MANAGEMENT, INC.; JEAN P. SASSON; WILLIAM MORROW & COMPANY, INC; AVON BOOKS; THE HEARST CORPORATION; and BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Second Circuit's decision approving the inclusion of attorney's fees in an appeal bond has important implications for the federal judicial system, not just petitioner Adsani, and warrants review by this Court for at least three reasons:

- it enables district courts to create a financial obstacle to appeals from their own judgments, skewing the balance of power between the federal appellate and trial courts;
- it deepens a split in the circuits over the meaning of the term "costs" in Appellate Rules 7 and 39; and
- it obscures the guidance of this Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), as to the scope of "costs" in procedural statutes.

Respondents Sasson and her publishers ("respondents") do not adequately consider these points in their opposition brief. They avoid altogether any mention of the first point: that district courts should not be able to transform the largely ministerial function of setting an appeal bond into a vehicle for limiting appellate review of their own decisions. Instead, respondents argue *ad hominem*, attacking Adsani on the extent of her showing of "financial hardship" (Resp. Br. at 21-23). Such a response is irrelevant to the issues before this Court.[1] The interpretation of Rule 7, and specifically whether district courts should be able to use it to insulate themselves from appellate review, is an institutional question basic to how our judicial system should

1. It is also inaccurate. Adsani was forced to sell her home in order to continue with the case. She was unable to post a supersedeas bond pending appeal, which allowed respondents to enforce their award of attorney's fees before the award could be reviewed. And now, because she has been unable to post the $35,000 Rule 7 bond, the Second Circuit has ordered that her deferred appeal on the merits must be dismissed.

function, not a matter of the financial means of any particular litigant.

Respondents' argument concerning supersedeas bonds and local rules permitting bonds in the district courts (Resp. Br. at 24) also ignores the basic institutional question. Such bonds operate solely within the confines of the district court and do not act as a direct bar to review. In contrast, the bond at issue here reaches beyond the district court to another avenue of potential redress for the litigant — the court of appeals. To allow the district court to become a gatekeeper on the route to appellate review, where the appeal is from the district court's own decisions, makes a mockery of the litigant's statutory *right* to such review. 28 U.S.C. §§ 1291, 1295; *see* App., 24a.

Respondents also are mistaken on the second point, the split in the circuits resulting from the lower court's interpretation of the term "costs" in Rules 7 and 39. Both the Third Circuit and the D.C. Circuit have stated categorically that because the "costs" to be bonded under Rule 7 are those defined in Rule 39, which does not include attorney's fees, Rule 7 does not authorize a bond to cover attorney's fees that may be assessed on appeal. *Hirschensohn v. Lawyers Title Ind. Corp.*, 1997 WL 307777 (3d Cir. 1997); *In re American President Lines*, 779 F.2d 714 (D.C. Cir. 1985).

The Second Circuit has now rejected those decisions in two respects. It denies that Rule 39 provides the definition of costs for Rule 7, or indeed a comprehensive definition of appellate costs at all (App., 17a-18a). And it holds that Rule 7 should be construed to allow security "for all of the funds to which [appellees] would be entitled after judgment in their favor" (App., 20a). These are propositions that place the Second Circuit sharply at odds with the Third Circuit and the D.C. Circuit. Moreover, the court's view of Rule 39 as not purporting to define costs but as simply concerning "procedures for taxing them" (App., 18a) places it in conflict with six other circuits that have held to the contrary (*see* Petition at 10).

Respondents are also wrong about Adsani's third point, which concerns the Second Circuit's misinterpretation of *Roadway Express* on the relationship between "costs" and attorney's fees. This Court in *Roadway Express* held that the term "costs" in 28 U.S.C. § 1927 does not include attorney's fees even where the underlying substantive statute permits a prevailing plaintiff to recover attorney's fees "as part of the costs." 447 U.S. 752, 757-58. This is because "costs" in section 1927 is to be measured by the definition of that term in 28 U.S.C. § 1920, a provision which must be read together with section 1927 as if they were an integrated procedural statute. 447 U.S. at 759-60. Thus, even if the underlying substantive statute permits an award of attorney's fees to a prevailing party "as part of the costs," as did the civil rights statutes at issue in *Roadway Express*, 42 U.S.C. §§ 1988, 2000e-5k, the term "costs" in the integrated procedural statute is not expanded to include attorney's fees.

Here, Adsani has shown in her Petition (at 13-14) that Rules 7 and 39 bear a relationship similar to that of sections 1927 and 1920, based on both the history and statutory purpose of those rules. Accordingly, attorney's fees are not included in the "costs" covered by Rule 7's bonding requirement even where an underlying substantive statute such as section 505 of the Copyright Act, 17 U.S.C. § 505, permits recovery of such fees "as part of the costs."

Respondents argue that Rules 7 and 39 should not be equated with sections 1927 and 1920, and that therefore *Marek v. Chesney*, 473 U.S. 752 (1985), should be applied to this case rather than *Roadway Express* (Resp. Br. at 16-18).[2] Critical to determining whether the provisions should be read together is the history of their adoption. As shown in Adsani's Petition (at 13-14), the

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2. Respondents acknowledge that *Marek* confirms the principle in *Roadway Express* "that the term 'costs' does not incorporate an attorney's fees provision in the underlying statute when the term comes with its own statutory definition." Resp. Br. at 18, citing *Marek*, 473 U.S. at 9 n.2.

Second Circuit's account of that history is simply wrong. Rule 7's bonding requirement does not post-date the 1909 adoption of the Copyright Act as the court below claimed (App. 15a), and therefore its authors cannot be assumed to have had the Copyright Act's attorney's fee provision in mind when the requirement was adopted. To the contrary, the statutory provisions from which Rule 7 emanates, like Rule 39, long predate the Copyright Act. Both incorporated the traditional "American rule" definition of "costs" that excluded attorney's fees (Petition at 14).

Respondents attack Adsani's historical account as "labored and misleading" (Resp. Br. at 18) but fail to identify any inaccuracy. The Second Circuit itself recognized the need to consider the history of the relevant procedural statutes to determine whether they stood on their own or incorporated the definition of costs from a substantive statute (App., 13a, 15a). Unfortunately, the Second Circuit misstated the history, and respondents' unreasoned endorsement of that view perpetuates an erroneous reading of the historical record.

Finally, respondents mistakenly argue that the dismissal of Adsani's merits appeal as a result of her failure to post the $35,000 bond will somehow render the bonding issue "moot" (Resp. Br. at 25-26). The argument reflects a misunderstanding of the doctrine of mootness and a basic misapprehension of what is at stake in this case. A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

Here the controversy is over whether an appeal bond in the amount of $35,000 (including prospective attorney's fees), the largest ever reported, should have been imposed as a precondition to an appeal on the merits. The dismissal of petitioner's appeal on the merits for failure to post bond does not diminish this controversy in any way. Indeed, it provides a concrete demonstration of how a district court can insulate its decisions on the merits from appellate review by imposing a massive bond.

Respondents assert, erroneously and without support in the record, that the issue is moot because Adsani has "chosen to abandon her merits appeal rather than post the bond" (Resp. Br. at 26). Even if the record were not clear, as it is, that this is a matter of inadequate means, not choice, respondents' argument would still be misguided. The petitioner's financial capacity is irrelevant to whether she has suffered adverse consequences from the order setting the appeal bond. She plainly has. These consequences are large and growing. The dismissal of petitioner's appeal now makes the order setting the appeal bond determinative of far more than the bonding issue itself. It now determines the outcome of this case on the merits. Respondents' mootness argument should be rejected.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, the Court should grant the writ.

Respectfully submitted,

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